Supreme Court, U.S.
FILED
DEC 5 2002

No. 02-840

In The Supreme Court of the United States

DIANA BONTA´, DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES,

Petitioner,

v.

CHILDREN'S HOSPITAL AND HEALTH CENTER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Supreme Court

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL S. SORGEN*
LAW OFFICES OF MICHAEL S. SORGEN
State Bar No. 43107
240 Stockton Street, 9th Floor
San Francisco, CA 94108
Telephone: (415) 956-1360

DEAN L. JOHNSON
DEAN L. JOHNSON, P.C.
State Bar No. 104558
11803 59th Avenue West
Mukilteo, WA 98275
Telephone: (425) 349-1444

Counsel for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REASONS TO DENY THE PETITION 1

I. THE DECISIONS OF THE CALIFORNIA COURTS DO NOT CONFLICT WITH ANY OTHER COMMERCE CLAUSE DECISION 2

II. DHS IS ACTING AS A MARKET REGULATOR RATHER THAN A MARKET PARTICIPANT 8

III. PETITIONER'S EQUAL PROTECTION ARGUMENT SHOULD BE REJECTED 10

IV. THE DECISION IN THIS CASE IS NOT OF NATIONAL IMPORTANCE 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Adair v. United States, 208 U.S. 161 (1908) 5

Associated Industries of Mo. v. Lohman, 511 U.S. 641 (1994) 4

Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders, 48 F.3d 701 (3d Cir. 1995) 10

Big County Foods v. Board of Education, 952 F.2d 1173 (9th Cir. 1992) 9

California v. Krivda, 409 U.S. 33 (1972) 12

Camps Newfoundland/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 5, 7

Children's Hospital and Health Center v. Belshe, 188 F.3d 1090 (9th Cir. 1999) 3

Delaware v. Prouse, 440 U.S. 648 (1979) 11

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 11

Herb v. Pitcairn, 324 U.S. 117 (1945) 11, 12

Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965) 11

Mental Hygiene Dept. v. Kirchner, 380 U.S. 194 (1965) 12

Minnesota v. National Tea Co., 309 U.S. 551 (1940) 11

New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) 4, 7

New York v. Class, 475 U.S. 106 (1986) 11

Pike v. Bruce Church, 397 U.S. 137 (1970) 8

TABLE OF AUTHORITIES – Continued

Page

SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2nd Cir. 1995) 9

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) 5

Washington State Bldg. & Constr. Trades v. Spellman, 684 F.2d 627 (9th Cir. 1982) 10

Welton v. Missouri, 91 U.S. 275 (1875) 5

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 12

STATUTES AND REGULATIONS

California Welfare & Institutions Code section 14105.15(i) 3, 4, 10, 13

IDAPA 16.03.10.456 (2000) 14

Ill. Adm. Code 148.310 (2001) 14

INTRODUCTION

The petitioner in this action is the California Department of Health Services ("DHS" or "petitioner"), the entity responsible for administering the Medi-Cal program. The respondents are 11 out-of-state hospitals located in Nevada, Oregon, and Arizona that have provided services in their own states to California residents covered by the Medi-Cal program.

At the trial, the respondents presented detailed evidence supporting the trial court's factual determinations, all of which the California court of appeal affirmed. Based on those facts, the California courts concluded that petitioner's out-of-state reimbursement plan was so grossly inequitable and discriminatory that it violated the Commerce Clause and the Equal Protection provisions of both the California Constitution and the U.S. Constitution.

In its petition, the DHS makes the same arguments that it made in the California courts, all of which have been soundly rejected at every level.

REASONS TO DENY THE PETITION

There are many reasons why DHS' petition should be denied.

I.

THE DECISIONS OF THE CALIFORNIA COURTS DO NOT CONFLICT WITH ANY OTHER COMMERCE CLAUSE DECISION

Some of the crucial factual determinations that the California courts used to support the conclusion that petitioner's reimbursement scheme was irrational, arbitrary and discriminatory are as follows:

- Out-of-state hospitals serve Medi-Cal patients who are much more costly to treat than the Medi-Cal patients treated by in-state hospitals.

- Regardless of the financial disincentives in treating Medi-Cal patients, out-of-state hospitals cannot refuse to treat most Medi-Cal patients or transfer them to a California hospital.

- DHS' payments to out-of-state hospitals have nothing to do with costs, acuity, or any of the other important factors that are considered for in-state hospitals.

- During a five-year time period the costs incurred by the respondent hospitals for treating Medi-Cal patients were $22,660,318, but the compensation the respondents received for those services was only $14,696,955, leaving a net cost shortfall of $7,963,363.

- In-state hospitals are entitled to challenge DHS' cost determinations administratively and judicially, and DHS is obliged to pay interest on the amounts in-state hospitals are ultimately determined to have been under-compensated, but

> out-of-state hospitals cannot similarly challenge the adequacy of the compensation they receive.

Pet. App. at 18a and 19a.

According to the California court of appeal, the "DHS annually distributes over $2 billion in disproportionate share adjustments to state hospitals, but 'has never made a payment of disproportionate share moneys to any out-of-state hospital'" Pet. App. at 18a. The DHS continued to exclude out-of-state hospitals from its disproportionate share program even after the holding in *Children's Hospital and Health Center v. Belshe,* 188 F.3d 1090 (9th Cir. 1999), that such an exclusion violated federal law.

The California courts found not only that petitioner's out-of-state reimbursement scheme was facially unfair, but that the manner in which the petitioner implements it exacerbates that unfairness. The petitioner uses an unweighted average instead of a weighted average as the basis for reimbursing out-of-state hospitals, which results in out-of-state hospital reimbursement rates that are 23.8 percent lower than the rates paid in-state hospitals. Pet. App. at 18a. Also, by using a rate that is set on December 1, and not adjusted until the next year, the petitioner pays out-of-state hospitals even less than the "current" average contract rate mandated by California Welfare & Institutions Code section 14105.15(i). *Id.*

Thus, through an interpretation of California Welfare & Institutions Code section 14105.15(i) that the California courts found to be illegal, DHS augments the already discriminatory burden that its reimbursement scheme

imposes on the respondents, which makes even more compelling the Constitutional violations.[1]

This Court should not grant certiorari to review the foregoing factual determinations.

These factual determinations are particularly significant in the context of the Commerce Clause. In such cases, "where discrimination is patent, . . . neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown" in order to invalidate the law. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 276 (1988). Also, according to well-established precedent "[a]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred." *Associated Industries of Mo. v. Lohman*, 511 U.S. 641, 650 (1994).

Because there are no facts that support its position, petitioner makes a variety of legal arguments that border on the ridiculous, such as the claim that this case does not involve interstate commerce.

As the court of appeal correctly notes, "the Supreme Court's definition of interstate commerce is notably capacious." Pet. App. at 28a. As used in the U.S. Constitution, the term "commerce" is a "term of largest import."

---

[1] Despite the undisputed findings of the California courts that the petitioner is underpaying out-of-state hospitals by not properly applying Welfare & Institutions Code section 14105.15(i), the petitioner has the effrontery to claim that it is paying out-of-state hospitals the maximum permitted by the statute, and that it could legally pay them much less. Pet. at 3, fn. 2.

Welton v. Missouri, 91 U.S. 275, 279 (1875). It "comprehends traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph – indeed, every species of commercial intercourse among the several States . . . " *Adair v. United States*, 208 U.S. 161, 177 (1908). Transactions "may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 549 (1944).

Respondents are clearly engaged in the business of interstate commerce. Over the time period for which they requested damages, the respondent hospitals provided at their facilities in Nevada, Oregon, and Arizona over $22 million of medical goods and services to Medi-Cal beneficiaries from California. Pet. App. at 19a. The treatment of those patients necessarily involved persons crossing state lines, which has long been recognized as a form of commerce. *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997). Also, medical records, insurance information, and patient-related information about those patients moved across State borders. Of course, money from California – meager as it was – flowed from California to hospitals in other states.

Thus, there is interstate commerce.

Despite the overwhelming evidence of petitioner's discrimination against out-of-state hospitals, all of which was unrefuted, the petitioner has the gall to assert that the court of appeal found that California "must *favor* out-of-state hospitals over in-state institutions." Pet. at 9,

original italics. Petitioner's characterization of the court of appeal decision is highly flawed.

To the extent the California courts found that respondent hospitals were entitled to higher reimbursement rates, it was not because they are located out-of-state, as the petitioner contends, but because they treated Medi-Cal patients who were demonstrably sicker (and therefore more expensive to take care of) than the Medi-Cal patients treated at in-state hospitals:

> DHS's reimbursement scheme obviously discriminates against out-of-state hospitals like respondents' that treat significant numbers of Medi-Cal patients. DHS's argument that the scheme is fair, boils down to no more than the false assertion that paying out-of-state hospitals the average of what DHS pays in-state hospitals with which it has contracts simply means that "out-of-state hospitals will receive less than some California contract hospitals receive and more than others do." This superficial argument ignores findings and substantial evidence that the "cost-mix" of Medi-Cal patients cared for by respondent hospitals is considerably higher than that of the in-state hospitals with which DHS contracts, so that the average rate paid such in-state hospitals is an invidious basis upon which to calculate the level of reimbursement that will fairly compensate respondents.

Pet. App. at 23a and 24a.

At the trial, respondents presented substantial evidence of the higher acuity of the Medi-Cal patients they

treat.[2] In the health care field, diagnostic related groups, or "DRGs," measure the acuity of a patient. As the court of appeal notes, "the trial court found that the average DRG weight of Medi-Cal patients treated by respondent hospitals was 'much higher' than that of the Medi-Cal patients treated by in-state hospitals with which DHS has contracts." Pet. App. at 21a, fn. 12.

Thus, this case is not analogous to *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) or *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988). Pet. at 7 and 8. In those cases, the goods or services being provided were exactly the same. In-state and out-of-state campers received the same services in *Camps*. Ethanol produced in Ohio is identical to ethanol produced out-of-state. Here, however, the Medi-Cal services being rendered at the respondent out-of-state hospitals are much more complicated and costly than the Medi-Cal services being rendered at in-state hospitals.[3]

---

[2] It would be a mistake to attach any significance to petitioner's statement that respondents are paid at a rate higher than that received by 58% of in-state contract hospitals because the DRG weight (and hence cost) of the Medi-Cal patients treated by respondent hospitals is much higher, in many cases two to three times higher, than that of the Medi-Cal patients treated by in-state hospitals with which DHS has contracts. Furthermore, out-of-state hospitals are not "in the same position as California hospitals which provide 90% of hospital inpatient services under Medi-Cal," as petitioner contends, because out-of-state hospitals treat much sicker patients than those typically treated at in-state contracting hospitals yet are not permitted to negotiate hospital-specific rates for the services they provide.

[3] Although petitioner claims that the decision in this case will mean that out-of-state entities will be entitled to have their

(Continued on following page)

Petitioner cites *Pike v. Bruce Church*, 397 U.S. 137 (1970) and claims, "the effect [of its rate scheme] is incidental and is far outweighed by the benefits of the payment system." Pet. at 10. However, as the facts set forth above clearly establish, the California courts did not find the petitioner's rate scheme had only "incidental effects," nor did it find any "benefits of the payment system." Furthermore, the *Pike* balancing test does not even apply because petitioner's rate scheme is invalid on its face and thus subject to the strictest judicial scrutiny: " . . . the total indifference of DHS to the true cost of care provided by out-of-state hospitals which serve significant numbers of Medi-Cal patients, and the denial to such hospital of any effective way to seek and obtain the administrative and judicial relief made available to in-state hospitals is facially untenable." Pet. App. at 25a.

II.

DHS IS ACTING AS A MARKET REGULATOR RATHER THAN A MARKET PARTICIPANT

It is clear that in controlling the rates to be paid to out-of-state hospitals for the services they are compelled to provide to Medi-Cal beneficiaries that the DHS is acting as a market regulator rather a market participant.

As the court of appeal correctly notes, "the state is not itself a consumer of the service in question, nor does it pick and choose service providers." Pet. App. at 31a.

---

transportation costs taken into account, that is not what the lower court held in this case, nor would such a claim be cognizable under the Medicaid Act or the California Medi-Cal program.

Instead of operating as a market participant, in setting out-of-state rates the DHS is simply "[d]ischarging conventional regulatory responsibilities imposed on it by state and federal law." *Id.* As a result, "[t]he level of reimbursement DHS allows is clearly not responsive to market forces." Pet. App. at 32a. Furthermore, "as DHS itself correctly points out in a different connection, there is no genuine private market regarding the delivery of care to Medi-Cal patients in which the state could participate." *Id.*

Petitioner relies upon *Big County Foods v. Board of Education,* 952 F.2d 1173 (9th Cir. 1992), a case in which a state statute permitted a school district to purchase dairy products if the price of the products were no more than 7% higher than the price of products of like quality produced outside the state. Based on that statute, the school district purchased milk from an Alaskan supplier even though the cost of the milk was higher than the bid submitted by an out-of-state supplier.

Big Country Foods did not involve, as this case does, forced compliance with another state's reimbursement scheme. If the out-of-state supplier in *Big Country Foods* had instead been compelled to provide milk at a substantially lower price than its own cost to produce that milk (in this case, the respondent hospitals are being compelled to provide Medi-Cal services for which they receive only 65% of their costs) then the facts would be similar to the instant case, but no such compulsion existed in *Big Country Foods.*

More instructive are several decisions involving compelled compliance with a governmental scheme. In *SSC Corp. v. Town of Smithtown,* 66 F.3d 502 (2nd Cir. 1995) the court held that a town is engaging in market

regulation, not market participation, when it threatens garbage haulers with criminal fines and jail terms if they fail to do business with it. In *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders,* 48 F.3d 701 (3d Cir. 1995) the court rejected the argument that a flow control ordinance constituted market participation where the county required garbage haulers to buy landfill services from the county. And, in *Washington State Bldg. & Constr. Trades v. Spellman,* 684 F.2d 627 (9th Cir. 1982) the court rejected the market participation characterization of a program that relied on civil and criminal penalties that only a state could enforce.

III.

PETITIONER'S EQUAL PROTECTION ARGUMENT SHOULD BE REJECTED

Petitioner's equal protection argument should be rejected for two reasons: (1) the Supreme Court does not have jurisdiction to review, in this state appeal, the application of the equal protection clause of the California Constitution and (2) there is no rational basis for petitioner's highly discriminatory out-of-state reimbursement scheme.

The California court of appeal relied upon both the State Constitution and the federal Constitution as the bases for its decision.[4] Pet. App. at 32a-37a. Because the

[4] The California court of appeal also found that petitioner's out-of-state rates violate California Welfare & Institutions Code section 14105.15(i), which is another adequate and independent state ground for its decision.

lower court's decision clearly depends upon both federal and state law, this Court should not upset that judgment. See *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487 (1965); *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

The sound policy behind this rule was well articulated by Mr. Justice Jackson in *Herb v. Pitcairn*, 324 U.S. 117 (1945):

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Id. at 125-126 (citations omitted).

The cases cited by the petitioner have no relevance to this case. In *New York v. Class*, 475 U.S. 106 (1986), the Supreme Court inferred that the lower court believed the statutory issue insufficient to resolve the case because of its discussion of the constitutional ground. In *Delaware v. Prouse*, 440 U.S. 648 (1979), the state court felt compelled by what it understood to be federal constitutional

considerations to construe its own law in the manner it did. And, in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the lower court did not mention the State Constitution, but instead relied upon the Supreme Court's First Amendment cases as controlling. None of the above-described facts apply to this situation.

Of course, if the Supreme Court believes it is unclear whether the California court of appeal relied on the State equal protection provision in reaching its decision, then it should be asked, rather than told, what it has intended:

> it seems consistent with the respect due the highest courts of states of the Union that they be asked, rather than told, what they have intended. If this imposes an unwelcome burden, it should be mitigated by the knowledge that it is to protect their jurisdiction from unwitting interference as well as to protect our own from unwitting renunciation.

Herb v. Pitcairn, 324 U.S. at 128 (1945); see also *California v. Krivda*, 409 U.S. 33 (1972); *Mental Hygiene Dept. v. Kirchner*, 380 U.S. 194 (1965).

At the trial, the DHS did not produce any evidence of a legitimate government purpose for distinguishing between hospitals based on location. Despite no support in the record for its discriminatory reimbursement scheme, DHS argues in its petition to this Court that there would be administrative problems created by attempting to apply to out-of-state hospitals the methods used to pay in-state hospital. Pet. at 19-22. However, as the court of appeal correctly notes, that argument is a red herring because the respondents never proposed that they be treated in exactly the same manner as in-state hospitals:

> DHS's argument that there is no workable alternative to the reimbursement scheme it began using in 1992 consists of little more than an explanation of the practical impossibility of treating out-of-state hospitals in exactly the same manner as in-state hospitals. The argument posits a straw man. Respondents have never proposed that they be treated in exactly the same manner as in-state hospitals. All they sought, and all the trial court ordered, was that DHS revert to the reimbursement scheme prescribed by DHS regulations in effect prior to the enactment of subdivision (i) in 1992 (tit. 22, former § 51543 (1992)), which had been approved by the HCFA and which DHS employed for many years without complaint.

Pet. App. at 35a and 36a. Petitioner did not show, and cannot show, that the reimbursement scheme it applied to out-of-state hospitals for many years prior to the enactment of Welfare & Institutions Code section 14105.15(i) lacks a rational basis.

IV.

THE DECISION IN THIS CASE IS NOT OF NATIONAL IMPORTANCE

This case is not of national importance.

The California court of appeal decision that petitioner seeks review of is binding precedent only in the First District of the court of appeal of the State of California.

Also, many states already successfully apply in-state procedures to high volume out-of-state hospitals like respondents, thereby avoiding the type of disparate treatment that the California courts found to be facially discriminatory.[5]

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

DEAN L. JOHNSON
DEAN L. JOHNSON, P.C.
State Bar No. 104558
11803 59th Avenue West
Mukilteo, WA 98275
Telephone: (425) 349-1444

MICHAEL S. SORGEN*
LAW OFFICES OF
MICHAEL S. SORGEN
State Bar No. 43107
240 Stockton Street,
9th Floor
San Francisco, CA 94108
Telephone: (415) 956-1360

**Counsel of Record*

Counsel for Respondents

[5] For example, in Georgia high volume out-of-state providers are actually enrolled into Georgia's Medicaid program and are subject to the same administrative requirements imposed on in-state hospitals. Commerce Clearinghouse (CCH) Medicare and Medicaid Guide, 2000, ¶15,574. Illinois applies its in-state procedures to out-of-state hospitals that provide 100 days or more of service to persons covered by the Illinois Medical Assistance Program. Ill. Adm. Code 148.310 (2001). Montana applies its in-state procedures to out-of-state facilities located no more than 100 miles outside of Montana. CCH Medicare and Medicaid Guide, 2000, ¶15,608. And, Idaho applies its in-state procedures to out-of-state hospitals with $50,000 or more of Idaho charges. IDAPA 16.03.10.456 (2000).